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JURISDICTIONAL DECISIONS IN INDIAN LAW: THE IMPORTANCE OF EXTRALEGAL FACTORS IN JUDICIAL DECISION MAKING

*Philip Lee Fetzer**

It would undoubtedly surprise the average American if he were told that his state had been taken to court by a "tribal government," or that federal judges could base their rulings on interpretations of "tribal sovereignty." Yet this is precisely the case. During the last decade the United States Supreme Court has ruled frequently on jurisdictional disputes between state and tribal governments. Justices have attempted to give a contemporary meaning to the concept of tribal sovereignty in an era of satellite transmissions and neutron bombs. Jurisdictional decisions of the Burger Court will be examined in the following discussion.

Background

It is important to realize that United States constitutional law concerning Indians is "unique and separate" from the rest of American jurisprudence.¹ Analogies to public lands law, civil rights law, and general constitutional law are not necessarily appropriate to Indian law. Indian law has evolved from certain western European concepts of international law, from specific sections of the United States Constitution, from treaties of both the colonial and federal governments, and from an entire volume of the United States Code.²

Although the Supreme Court has not given a definitive opinion on the precise test to be used in Indian law cases, two rules have been developed for general application to treaties, agreements, statutes, and executive orders: they are (1) "very liberal construction to determine whether Indian rights exist" and (2) "very strict construction to determine whether Indian rights [have been] abrogated."³ The rules form the basis of the canons of construction in Indian law.

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1. UNITED STATES COMMISSION ON CIVIL RIGHTS, INDIAN TRIBES—A CONTINUING QUEST FOR SURVIVAL 23 (1981) [hereinafter cited as INDIAN TRIBES].

2. *Id.*; 25 U.S.C. (1976).

3. D. GETCHES, D. ROSENFELT, & C. WILKINSON, FEDERAL INDIAN LAW 204 (1979) [hereinafter cited as GETCHES].

The principle of tribal sovereignty was first enunciated in *Cherokee Nation v. Georgia* in 1831.⁴ It was then discussed in *Worcester v. Georgia* the following year.⁵ The principles of tribal sovereignty described in *Worcester* "came to be accepted as law," said Justice Black, speaking in *Williams v. Lee* in 1959.⁶ The state would have jurisdiction "where essential tribal relations [were] not involved, and where the rights of Indians would not be jeopardized."⁷ The Justice concluded that: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."⁸

Understanding the distinctive nature of federal Indian law and the traditional judicial interpretation of tribal sovereignty is a necessary, yet ultimately insufficient, requirement for comprehending jurisdictional decisions in the last decade. It is the thesis of this article that external factors may help explain rulings that might otherwise prove confusing to the student of Indian law.

That judicial decisions may reflect the extralegal situation is not a novel idea. However, it is usually difficult to provide data that clearly correlates with particular judicial outcomes. The lack of consistent application of traditional Indian law canons and concepts to the cases herein described argues strongly for explanations that go beyond internal analysis of judicial logic.

HYPOTHESIS

If the Indian population directly affected by the decision is larger than the non-Indian population within the reservation boundaries, a majority of the Court will vote in favor of the Indians; otherwise, the Court majority will vote against the Indians.

My thesis is that in the last decade a majority of the Justices of the Supreme Court have made jurisdictional rulings in conflicts between state and tribal governments by taking into account the numbers of Indians versus the numbers of non-Indians who would be directly affected by their decisions. In other words, despite the importance of Indian law concepts, the Court may be more concerned with numerical advantages in a given situation.

4. 30 U.S. (5 Pet.) 1 (1831).

5. 31 U.S. (6 Pet.) 515 (1832).

6. 358 U.S. 217, 219 (1959).

7. *Id.*

8. *Id.* at 220.

The following table compares the relative numbers of Indians and non-Indians (within the reservation boundaries) affected by United States Supreme Court decisions in the last decade.

UNITED STATES SUPREME COURT DECISIONS AFFECTING INDIANS
IN JURISDICTIONAL DISPUTES⁹

CASE	YEAR	INDIAN POPULATION ¹⁰	NON- INDIAN POPULATION ¹¹	RESULTS FOR INDIANS
<i>McClanahan v. Arizona Tax Commission</i>	1973	131,400	8,000	Win
<i>Mattz v. Arnett</i>	1973	1,224	600	Win
<i>DeCoteau v. District County Court*</i>	1975	3,000	30,000	Loss
<i>Moe v. Confederated Salish*</i>	1976	2,875	12,125	Loss
<i>Rosebud Sioux v. Kneip*</i>	1977	1,641	15,661	Loss
<i>Oliphant v. Suquamish*</i>	1978	50	2,928	Loss
<i>Washington v. Colville*</i>	1980	10,350 ¹²	24,284	Loss
<i>White Mountain Apache v. Bracker</i>	1980	6,500	3,300	Win
<i>Central Machinery Co. v. Arizona Tax Commission</i>	1980	8,321	1,700	Win
<i>Montana v. United States</i>	1981	4,208	1,750	Loss
<i>Merrion v. Jicarilla*</i>	1982	2,100	—	Win

*Population figures provided in text of opinion.

9. Population estimates based on information from HAMMONDS WORLD ATLAS (1962); 1977 COMMERCIAL ATLAS AND MARKETING GUIDE (1977); 1981 COMMERCIAL ATLAS AND MARKETING GUIDE; UNITED STATES DEPARTMENT OF COMMERCE—FEDERAL AND STATE INDIAN RESERVATIONS (1974); GETCHES, *supra* note 3.

10. When the population figure for Indians was not provided in the text of the opinion, the source for the population was UNITED STATES DEPARTMENT OF COMMERCE, *supra* note 11. The latest Bureau of Indian Affairs estimates were made in 1972. It was not possible to fairly estimate the growth of Indian population since that time. The Indian population figures are those of the BIA from March 1972, except in the case of *Mattz v. Arnett*, 412 U.S. 481 (1973), which are from August 1969.

11. Where the non-Indian population was not provided in the text of the opinion, estimates were made based on population figures of cities within the reservation boundaries based on the latest census pertinent to the case.

12. Tribal population was as follows: Colville, 3,200; Lummi, 1,250; Makah, 900; Yakima, 5,000.

Evidence provided herein also correlates with the argument that a majority of the Justices will be responsive to the existence of organized anti-Indian groups. Of the eleven decisions described and analyzed in this article, five were won by Native Americans. In every decision lost by Indians the case originated in a state where anti-Indian organizations had been active.¹³ All rulings favoring Indians were initiated in states where hostile committees were not prominent.¹⁴

McClanahan v. Arizona Tax Commission

The United States Supreme Court acted unanimously in rejecting the application of a state income tax to an Indian whose entire income was derived from reservation resources.¹⁵ Justice Marshall spoke for the Court in the last of three Navajo cases.¹⁶

The Court held that *Worcester* "plainly extended to state taxation within the reservation."¹⁷ Nevertheless, the doctrine of tribal sovereignty had not remained static for more than 140 years. "[N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians," commented Justice Marshall.¹⁸ The contemporary cases did not rely upon "platonic notions of Indian sovereignty," but instead looked to the pertinent treaties and statutes that defined the limits on state power.¹⁹

Even though the Treaty of 1868 establishing the Navajo Reservation had not explicitly provided that tribal members were to be exempt from state taxes, liberal interpretation of the treaty, along with the tribe's tradition of independence, compelled the conclusion that the reservation lands were "within the exclusive sovereignty of the Navajos under general federal supervision," said Justice Marshall.²⁰ The tribe had won its third straight contest with the state of Arizona at the Supreme Court.

In all three Navajo cases, the traditional concept of tribal sovereignty as developed by Chief Justice Marshall in *Worcester*

13. South Dakota, Montana, and Washington.

14. Arizona, California, and New Mexico.

15. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973).

16. *Id.*; *Warren v. Arizona Tax Comm'n*, 380 U.S. 65 (1965); *Williams v. Lee*, 358 U.S. 217 (1959).

17. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 169 (1973).

18. *Id.* at 171.

19. *Id.* at 172.

20. *Id.* at 174-75.

could have accounted for the tribe's successes. However, the traditional interpretations were to be frequently rejected by the Court in later years.

Mattz v. Arnett

In this case,²¹ a Yurok Indian in California appealed his conviction for violation of state game laws prohibiting the use of gill nets for fishing. He alleged that his arrest and the subsequent seizure of his fishing equipment had transpired in Indian country and that the state had therefore exceeded its jurisdiction.²² The area involved in the dispute was approximately 160 acres of sparsely populated land in the northwestern part of the state.²³

The Court unanimously reversed the California court decision.²⁴ Justice Blackmun, speaking for the Court, held that the section 1151 definition of Indian country applied to the disputed land.²⁵ The area where the arrest had taken place was part of the old Klamath Reservation that had been opened to homestead entry in 1892.²⁶ The Justice decided that the reservation had not been terminated, although the House of Representatives had been hostile to its continuation as a reservation. Congress was "fully aware of the means by which termination could be effected," Justice Blackmun reasoned, but "clear termination language" had not been used in the 1892 Act. The Justice adopted what became known as the *Mattz* test. "A congressional determination to terminate must be expressed on the face of the Act or be clear from surrounding circumstances and legislative history," stated Justice Blackmun.²⁷

21. *Mattz v. Arnett*, 412 U.S. 481 (1973).

22. "Indian country" is defined in 18 U.S.C. § 1151 as follows:

[T]he term "Indian country," as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Quoted in *GETCHES*, *supra* note 3, at 348.

23. *Arnett v. 5 Gill Nets*, 20 Cal. App. 3d 729, 97 Cal. Rptr. 894 (1971).

24. *Mattz v. Arnett*, 412 U.S. 481, 482 (1973).

25. *Id.* at 506 n.23.

26. *Id.* at 485.

27. *Id.* at 504-05.

DeCoteau v. District County Court

A habeas corpus challenge to the jurisdiction of state courts in a custody dispute had resulted in conflicting rulings by the South Dakota Supreme Court and the Eighth Circuit Court of Appeals.²⁸ Justice Stewart, speaking for a 6-3 majority, ruled in favor of the state upon appeal to the United States Supreme Court.²⁹

Justice Stewart began by noting that 30,000 non-Indians lived within the 1867 boundaries of the Lake Traverse Reservation (where alleged offenses had occurred), whereas only about 3,000 Sioux resided therein.³⁰ The legislative history was "largely irrelevant to the issues," he said, and the jurisdictional history was "not wholly clear," either.³¹ Despite the foregoing evidence, Justice Stewart decided that the face of the act, its surrounding circumstances, and legislative history all pointed "unmistakably to the conclusion" that the Lake Traverse Reservation had been terminated in 1891.³²

An 1889 Agreement ratified by the United States in 1891 had provided for the cession of "all" the unallotted land of the affected tribe.³³ Justice Stewart believed that: "For the courts to reinstate the *entire* reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians."³⁴

Justice Douglas was joined in dissent by Justices Marshall and Brennan.³⁵ He believed that the "so-called jurisdiction acts" had occurred in Indian country.³⁶ The Indians had been granted a "permanent reservation" with boundaries defined by an 1867 treaty. There was no evidence that the reservation boundaries had been altered or that the jurisdictional acts had taken place outside them.³⁷

28. United States *ex rel.* Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973); *DeCoteau v. District County Court*, 87 S.D. 555, 211 N.W.2d 843 (1973).

29. *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

30. *Id.* at 428.

31. *Id.* at 438, 442.

32. *Id.* at 445.

33. *Id.* at 446.

34. *Id.* at 447.

35. *Id.* at 460.

36. *Id.*

37. *Id.* at 460-61.

The Court majority acknowledged that the alleged wrongful acts leading to the original custody dispute had occurred either on non-Indian patented land or on Indian allotments over which the state had no jurisdiction.³⁸ The state claimed that the transgressions happened on the non-Indian unallotted land "within the exterior boundaries of the Lake Traverse Reservation" as established by the 1867 treaty.³⁹ The section 1151 definition of Indian country would appear to have included the aforementioned land considering the following language: "[Indian country includes] all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent.*"⁴⁰

The *DeCoteau* ruling must be viewed against the background of the political situation in South Dakota in the mid-1970s. Indians had occupied the town of Wounded Knee and had confronted FBI agents only a few months before the original state supreme court decision. Outspoken South Dakotans had formed a political organization called the Tri-County Protective Association in response to the activities of militant Indians in the state. The group's members were opposed to the extension of Indian rights.⁴¹ Finally, the controversy involved only 3,000 Indians who were matched against 30,000 non-Indians. Given the circumstances surrounding the case, the High Court's disposition of it can be readily understood.

Moe v. Confederated Salish & Kootenai Tribes

In this case, an Indian who operated a smoke shop on reservation land in Montana was arrested by state officials for failure to possess a cigarette retailer's license and for selling unstamped cigarettes. The businessman brought suit, contending that the state lacked jurisdiction to prosecute him.⁴² Justice Rehnquist, speaking for a unanimous Court, held that the state did not have any of the following powers: "a. to impose a personal property tax on property within the reservation owned by Indians; b. to impose a vendor's license fee on reservation Indians doing business for the tribe within the reservation; c. to collect a cigarette

38. *Id.* at 429 n.3.

39. *DeCoteau v. District County Court*, 87 S.D. 555, 211 N.W.2d 843, 844 (1973).

40. 18 U.S.C. § 1151 (1976) (emphasis added).

41. INDIAN TRIBES, *supra* note 1, at 8.

42. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

sales tax on reservation sales by Indians to other Indians.”⁴³ The state *did* have the authority to require the businessman to add the state tax to cigarettes sold to non-Indians, however.⁴⁴

The tribe argued that requiring its members to add the sales tax to purchases by non-Indians from Indians would impose “a measurable out-of-pocket loss” on the Native American retailers.⁴⁵ The High Court rejected the tribal argument, adopting the state’s position that non-Indian consumers were reaping the benefits of a tax exemption by purchasing the cigarettes on the reservation.⁴⁶

In Justice Rehnquist’s view, the tribal members were enjoying a competitive advantage based on the commission of misdemeanors by non-Indians.⁴⁷ Forcing Indians to aid the state in the collection of a tax was a “minimal burden” on the tribal seller, Rehnquist concluded.⁴⁸

The Supreme Court in *Williams* had ruled that reservation Indians were to be allowed to “make their own laws and be ruled by them.”⁴⁹ *Moe* appears to have been contradictory to that teaching. Native Americans could be required to act as agents of the state by adding a tax from which they would receive no future benefits. In the decision, then, the Indians were neither making their own laws nor being ruled by them.

The political situation in *Moe*, as in *DeCoteau*, seems pertinent to the result. A pressure group called Montanans Opposed to Discrimination had organized in 1974 in the vicinity of the Flathead Reservation occupied by the Salish and Kootenai tribes. Organization members were opposed to any extension of tribal rights affecting jurisdiction over non-Indians.⁵⁰ Additionally, as the table indicates, more than four times as many whites as Indians lived in the area directly affected by the decision.

Rosebud Sioux Tribe v. Kneip

The High Court ruled that certain acts of Congress had reduced the boundaries of the Great Sioux Indian Reservation.⁵¹ Justice

43. *Id.* at 480-81.

44. *Id.* at 481-82.

45. *Id.* at 481.

46. *Id.* at 480-81.

47. *Id.* at 482.

48. *Id.* at 483.

49. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

50. INDIAN TRIBES, *supra* note 1, at 7.

51. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

Rehnquist spoke for the Court once more, stating that congressional intent would be decisive to the ruling. He further declared that the *Mattz* test would be appropriate in determining whether such intent was present in past legislative acts.⁵²

An 1868 treaty established the reservation. In 1889 an act of Congress reduced the reservation by 50%. An amendment to the act was not ratified by the tribe in 1901. The unratified amendment provided for cession of 416,000 acres of unallotted land in Gregory County for the sum of \$1,040,000.⁵³ The Sioux contended that, absent ratification by the required three-fourths majority, and absent a fixed-sum provision in later acts, Congress had not acted to diminish the reservation boundaries.⁵⁴

Justice Rehnquist had a different perspective:

[W]e conclude that although the Acts of 1904, 1907, and 1910 were unilateral Acts of Congress without the consent of three-quarters of the tribe required by the original Treaty, that fact does not have any direct bearing on the question of whether Congress by these later Acts did intend to diminish the reservation boundaries.⁵⁵

Even though the Court claimed to have adopted the *Mattz* test, the majority did not feel bound by the prior ruling.⁵⁶ "[T]hat such express language in an act [was] the *only* method by which congressional action may result in disestablishment [was] quite inconsistent" with *Mattz*, said Justice Rehnquist.⁵⁷ The Court then found "an unmistakable baseline purpose of disestablishment" in the unratified agreement of 1901.⁵⁸

Justice Marshall dissented, joined by Justices Brennan and Stewart. He noted that the Court had concluded in a prior decision that opening an area to homesteading was not necessarily inconsistent with continued reservation status.⁵⁹ Additionally, in the case at hand, the High Court had not applied liberal construction to the treaty nor strict construction to the acts as expected under the general rules of Indian law.⁶⁰

52. *Id.* at 586.

53. *Id.* at 590-91.

54. *Id.* at 587.

55. *Id.*

56. See *Mattz v. Arnett*, 412 U.S. 481, 505 n.23 (1973).

57. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977).

58. *Id.* at 592.

59. See *Seymour v. Superintendent*, 368 U.S. 351 (1962).

60. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 617 (1977).

The legislative history of the acts was "extraordinarily sparse," in Justice Marshall's view. Furthermore, Congress had demonstrated an "almost complete lack" of interest in the boundary issue.⁶¹ There was "confusion" and "indifference" about the implication of the acts, but there was certainly no *clear intent* to terminate the reservation.⁶²

The *Rosebud Sioux* decision failed the *Mattz* test *in toto*. The face of the acts was not clear; the legislative history was brief and lacking in substance; and the surrounding circumstances were at least inconclusive on the depth of congressional intent to reduce the boundaries. Traditional canons of Indian law were not applied despite the involvement of a treaty. A partial explanation for the ruling may be political.

Following the 1973 Indian occupation and siege of Wounded Knee, local citizens formed a political pressure group.⁶³ The members of the organization, mostly ranchers who lived near the Pine Ridge Sioux Reservation, carried "citizens band radios and their own weapons," said a recent study.⁶⁴ The Tri-County Protective Association later joined with another group that had organized near the Cheyenne River Sioux Reservation to form the South Dakotans for Civil Liberties in the mid-1970s.⁶⁵ The anti-Indian backlash continued when the South Dakota committee merged with other groups to form the Interstate Congress for Equal Rights and Responsibilities (ICERR).⁶⁶

The *Rosebud Sioux* decision directly affected about 1,600 Indians and 16,000 whites.⁶⁷ Given the relative numbers of the parties to the suit and the formation and activities of anti-Indian organizations in South Dakota, the final resolution of the case is not surprising.

Oliphant v. Suquamish Indian Tribe

Two non-Indians were arrested and charged with violating tribal laws on the Port Madison Reservation in Washington state.

61. *Id.* at 626, 629.

62. *Id.* at 629-30. For a critique of the decision, see Case Developments, *Indian Land Claims—A Question of Congress' Right to Unilaterally Abrogate Indian Treaty Provisions: Rosebud Sioux Tribe v. Richard Kneip*, 21 How. L.J. 625 (1978).

63. INDIAN TRIBES, *supra* note 1, at 8.

64. *Id.*

65. *Id.*

66. *Id.* at 9.

67. *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 88 n.4 (8th Cir. 1975).

One of the defendants allegedly assaulted a tribal officer and resisted arrest. The other was charged with driving at an excessive speed that caused reckless endangerment to others.⁶⁸ Both of the accused sought writs of habeas corpus. They argued that the tribe was without authority to try them for the offenses. Justice Rehnquist, speaking for a 6-2 majority, held that tribal Indian courts do not have "inherent jurisdiction to try and to punish non-Indians."⁶⁹

The reservation was established as a result of the Treaty of Point Elliott in 1855.⁷⁰ At the time of the United States Supreme Court ruling, nearly 3,000 non-Indians lived on the reservation along with about 50 members of the Suquamish Tribe.⁷¹ Justice Rehnquist described the reservation as "a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways."⁷²

The Suquamish were not alone in the assumption of criminal jurisdiction over non-Indians on the reservation at the time of the decision. Of 127 tribal court systems, 33 had assumed such jurisdiction by the late 1970s.⁷³ Noting that no previous ruling on the issue had been handed down in the history of the Supreme Court, Justice Rehnquist concluded that "it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect."⁷⁴ The earliest treaties had contained language suggesting that Indians may have had criminal jurisdiction over non-Indian offenders, but later treaties lacked such language. Justice Rehnquist did not believe that the early treaty provisions lent significant support to the tribe's position.⁷⁵

In ruling against the tribe, the Court appeared to violate basic tenets of Indian law. Justice Rehnquist acknowledged that Congress had never expressly forbidden Indian tribes to impose criminal sanctions on non-Indians.⁷⁶ He also construed the meaning of the treaty to the benefit of the white majority rather than

68. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978).

69. *Id.* at 212.

70. 12 Stat. 927 (1855).

71. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978).

72. *Id.* at 193.

73. *Id.* at 196.

74. *Id.* at 197.

75. *Id.* at 197-98 n.8.

76. *Id.* at 204.

to that of the tribe.⁷⁷ For example, Rehnquist noted that the treaty was silent as to tribal criminal jurisdiction over non-Indians and ruled against extending treaty rights to the Native Americans in the case at bar.⁷⁸ In contrast, the High Court had decided in favor of protecting hunting and fishing rights in *Menominee* even though the treaty under review did not refer to the rights at all.⁷⁹ In the hunting and fishing rights case the Court appropriately applied the canons of Indian law; in *Oliphant*, it did not.

The *Oliphant* ruling directly contradicted *Williams* in at least two important respects. *Williams* states in part that: "[i]f the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive."⁸⁰ *Oliphant's* alleged offense was against a tribal officer. Additionally, the Court itself acknowledged that Congress had never expressly prohibited application of tribal law to non-Indian offenders. The opinion contained no evidence that Congress had ever conferred jurisdiction for crimes against Indians upon state courts.

Williams also concluded that the state could not impose laws that "infringe on the right of the Indians to govern themselves."⁸¹ The *Oliphant* ruling actually favored infringement of important tribal rights. An important recent study commented as follows on *Oliphant*:

This issue [tribal criminal jurisdiction over non-Indians] had been a highly emotional and controversial one on and near Indian reservations and a significant factor in the development of organizations such as the South Dakotans for Civil Liberties. The majority opinion, with its dicta concerning the rights of non-Indians, was greeted as a major victory for the "backlash" point of view.⁸²

Oliphant originated from Washington state, the state where the ICERR was founded in the mid-1970s. Organized anti-Indian activities were common in the state during the years immediately preceding the Court ruling.⁸³ The relative numbers of the contend-

77. *Id.*

78. *Id.* at 206.

79. *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

80. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

81. *Id.* at 223.

82. INDIAN TRIBES, *supra* note 1, at 12.

83. *Id.* at 71.

ing parties to the suit would not appear to have been irrelevant to the decision either. Apparently the numerical weight of 3,000 non-Indians was more important to the Justices than the mere legal weight of treaty rights for 50 Indians.

*Washington v. Confederated Tribes of the
Colville Indian Reservation*

On a direct appeal from federal district court rulings in companion cases from Washington state,⁸⁴ the Supreme Court reversed.⁸⁵ Justice White spoke for a six-member majority that upheld application of a state tax on the purchase of cigarettes by non-Indians from Native American retailers on the reservation.⁸⁶

In Justice White's view, the critical issue was preemption. Could a tribe deprive a state "from any power to tax on-reservation purchases by nonmembers of the tribe by imposing its own tax on the transaction or by otherwise earning revenues from the tribal business"?⁸⁷ The answer was no. Neither the Indian Reorganization Act, the Indian traders statutes, the Indian commerce clause, nor prior treaties could be used to exempt the tribes from these taxes.⁸⁸ The Justice reasoned that even though both tribal and state governments would be taxing cigarette sales on the reservation, there would be "no direct conflict between the state and tribal schemes, since each government [would be] free to impose its taxes without ousting the other."⁸⁹

Because tribal sellers heretofore had been exempt from application of the state sales tax on cigarettes, they had profited from a price advantage on their retail sales to non-Indians on the reservation. Tribal revenue was likely to shrink considerably if the tax exemption ended. As Justice White stated: "All parties agree that if the State were able to tax sales by Indian smokeshops and eliminate that \$1 saving, the stream of non-Indian bargain hunters would dry up."⁹⁰ The fact that the tribes would lose substantial revenue for "essential governmental services, includ-

84. *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp. 1339 (E.D. Wash. 1978); *United States v. Washington*, 446 F. Supp. 1367 (E.D. Wash. 1978).

85. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

86. *Id.* at 136-37.

87. *Id.* at 138.

88. *Id.* at 155-57.

89. *Id.* at 158.

90. *Id.* at 145.

ing programs to combat severe poverty and underdevelopment [on] reservations" was not relevant.⁹¹ "Moe makes clear that the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all," said Justice White.⁹²

Application of the state tax to on-reservation cigarette sales meant that the tribes would be given a Hobson's choice: keep the tribal tax but risk heavy losses for Indian retailers, or drop the tribal tax and lose substantial revenue for tribal government.⁹³ The prior competitive advantage for Indian sellers would be turned into a competitive disadvantage if each tribe retained its tax. What non-Indian purchaser would come onto the reservation and pay double taxes on cigarettes?

The Court's interpretation of tribal sovereignty in *Colville* sharply contrasts with its prior elucidation of the concept in such leading cases as *Worcester v. Georgia* (1832) and *Williams v. Lee* (1959).⁹⁴ In *Colville*, Justice White said that: "The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."⁹⁵

In *Worcester*, Chief Justice Marshall presented his view:

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.⁹⁶

As previously indicated, a unanimous Court in *Williams* ruled that a state would have jurisdiction only "where essential tribal relations" were *not* involved.⁹⁷

The *Colville* Court acknowledged that affected tribes would lose substantial sums of money for "essential governmental services" as a direct result of its ruling.⁹⁸ An alleged "accom-

91. *Id.* at 154.

92. *Id.* at 151 n.27.

93. *Id.* at 170-71.

94. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Williams v. Lee*, 358 U.S. 217 (1959).

95. *Colville*, 447 U.S. at 156.

96. *Worcester*, 31 U.S. at 560.

97. *Williams*, 358 U.S. at 219.

98. *Colville*, 447 U.S. at 154.

modation" between state and tribal interests to the distinct disadvantage of the tribes is clearly inconsistent with Indian law doctrine on tribal sovereignty.

If the Court's rationale cannot be squared with its prior holdings, how might one explain its decision? As with *Oliphant*, the *Colville* cases originated in the state of Washington. The state is well known to be the home of anti-Indian groups such as the ICERR. Numerous demonstrations against the extension of rights to Native Americans occurred in Washington during the years immediately prior to the *Colville* decision.⁹⁹ Additionally, the numerical contrast should be noted. As the table indicates, approximately 10,000 Native Americans were directly affected by the ruling compared with 24,000 whites.

White Mountain Apache Tribe v. Bracker

The state of Arizona required the Pinetop Logging Company to pay a motor carrier license tax and also imposed a use fuel tax upon the company. The business consisted of two non-Indian corporations that operated only on the Fort Apache Reservation.¹⁰⁰ Speaking for a 6-3 majority, Justice Marshall held that the state did not have authority to impose either the license tax or the fuel tax on the company.¹⁰¹

At the outset, Justice Marshall noted that more than 90% of the tribe's annual profits were earned by timber operations, including those of the logging company.¹⁰² Additionally, fifty tribal members worked for the business.¹⁰³ The state motor carrier license tax was equal to 2.5% of the carrier's gross income and the fuel tax was eight cents a gallon.¹⁰⁴

There were two potential arguments against the state's assertion of authority in the case. First, the authority may have been preempted by federal law under *Warren v. Arizona Tax Commission*.¹⁰⁵ The Supreme Court had ruled in *Warren* that federal regulations affecting reservation Indians may effectively preempt imposition of overlapping state laws. Second, the state may have

99. INDIAN TRIBES, *supra* note 1, at 71-73.

100. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 137-38 (1980).

101. *Id.* at 151.

102. *Id.* at 138.

103. *Id.* at 139.

104. *Id.* at 139-40.

105. 380 U.S. 685 (1965).

unlawfully infringed on the right of reservation Indians to govern themselves.¹⁰⁶

The preemption argument prevailed. There were already detailed regulations by the Secretary of the Interior governing the harvesting and selling of timber. Similar regulations applied to use of the highways. Justice Marshall concluded that the federal regulatory scheme was "so pervasive as to preclude the additional burdens sought to be imposed in this case."¹⁰⁷

The state had argued the reverse side of the Supreme Court's opinion in *Oliphant*. Whereas in *Oliphant* the Court held that the tribe had no jurisdiction unless there was an express congressional statement conferring that authority, the state argued in *White Mountain Apache* that Arizona would have jurisdiction unless expressly negated by Congress.¹⁰⁸ The argument was "simply not the law," said Justice Marshall.¹⁰⁹

Central Machinery Co. v. Arizona Tax Commission

In a companion case,¹¹⁰ the Supreme Court ruled 5-4 that a state tax on the sale of farm machinery to reservation Indians was not valid. The seller neither resided on the reservation nor was licensed to trade with Indians.¹¹¹

Justice Marshall, again speaking for the Court, held that federal laws preempted state jurisdiction in the situation. Congress passed a 1790 statute that regulated trade with Indians. The law "comprehensively regulated trade with Indians," said the Justice.¹¹²

The only differences between the case at bar and *Warren*, in Marshall's view, were that the appellant was not a licensed trader and he did not maintain a permanent place of business on the reservation.¹¹³ These factors were considered irrelevant by the Court. "Until Congress repeals or amends the Indian trader statutes, however, we must give them 'a sweep as broad as [their] language,'" concluded Justice Marshall.¹¹⁴

106. *White Mountain Apache Tribe*, 448 U.S. 136, 142 (1980), *quoting* *Williams v. Lee*, 358 U.S. 217 (1959).

107. *Id.* at 148.

108. *Id.* at 150-51.

109. *Id.* at 151.

110. *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980).

111. *Id.* at 161.

112. *Id.* at 163.

113. *Id.* at 164.

114. *Id.* at 166.

In both *White Mountain Apache* and *Central Machinery*, the Court found the reasoning used in *Warren* dispositive. Traditional concepts of tribal sovereignty were fundamental to the decision in *Warren*.¹¹⁵ In that case Justice Black quoted *Worcester* to the effect that: "The treaties and laws of the United States contemplate[d] the Indian territory as completely separated from that of the states. . . ." ¹¹⁶

In addition to the fact that both decisions were clearly in the tradition of Indian law canons, two other factors are noteworthy: (1) the cases both originated in Arizona, a state where organized anti-Indian groups have not gained prominence; (2) the tribal members directly affected in each decision outnumbered non-Indian residents of their reservations by a wide margin, as the table indicates.

Montana v. United States

The state of Montana appealed an adverse ruling by the Ninth Circuit Court of Appeals granting the Crow Tribe jurisdictional rights over fishing in the Big Horn River.¹¹⁷ The Supreme Court unanimously reversed.¹¹⁸

Justice Stewart, speaking for the Court, rejected the tribal claim to jurisdictional rights over fishing.¹¹⁹ The Fort Laramie Treaty of 1851 provided that the Crow "[would] not surrender the privilege of hunting, fishing, or passing over any of the tracts of country" described in the treaty.¹²⁰ The 1868 treaty, which established the Crow Reservation, described the land as "set apart for the *absolute and undisturbed use and occupation* of the Indians," said Justice Stewart.¹²¹ The Justice believed that even supposing the second treaty "created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power [could] not apply to lands held in fee by non-Indians."¹²²

The Crow retained certain rights as an aspect of their sovereignty. However, stated Justice Stewart: "[E]xercise of

115. *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 688 (1965).

116. *Id.*, quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

117. *United States v. Montana*, 457 F. Supp. 599 (D. Mont. 1978), *rev'd* 604 F.2d 1162 (9th Cir. 1979), *rev'd* 450 U.S. 544 (1981).

118. *Montana v. United States*, 450 U.S. 544 (1981).

119. *Id.* at 557-60.

120. *Id.* at 558.

121. *Id.*, quoting from 15 Stat. 649 (1868) (emphasis added).

122. *Id.* at 559.

tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."¹²³ Regulation of hunting and fishing of non-Indians by the tribes did not bear a "clear relationship to tribal self-government," he concluded.¹²⁴

The Court's decision in *Montana* rejected claims of tribal sovereignty even though two treaties were involved. The Fort Laramie Treaty made specific reference to hunting and fishing rights.¹²⁵ Furthermore, the Crow Treaty of 1868 provided for the "absolute and undisturbed use" of the land by the tribe.¹²⁶ Conferring state jurisdiction over treaty land under the conditions present in *Montana* appears contradictory both to the canons of Indian law and to what would appear to be the most impartial deductions from the treaty language.

The Crow's loss in *Montana* does not fall readily to extralegal analysis. The case did originate in a state where organizations hostile to the extension of Indian rights had been active in the years immediately preceding the ruling.¹²⁷ However, the relative numerical strengths of the contending parties within the reservation would have suggested a victory for tribal government.

Merrion v. Jicarilla Apache Tribe

On an appeal from a Tenth Circuit Court of Appeals' ruling approving a tribal tax on oil and natural gas extracted from reservation lands,¹²⁸ the Supreme Court affirmed by a vote of 6-3. Justice Marshall spoke for the Court.¹²⁹

The Court held that (1) the tribe had the "inherent power" to impose the tax; (2) the tax was "an essential attribute of Indian sovereignty"; (3) nonmembers who entered tribal territory were subject to the tribe's power to exclude them. The power to exclude non-Indians "necessarily" included the power to place a tax on business as a condition of entry.¹³⁰

123. *Id.* at 564.

124. *Id.* .

125. *Id.* at 558.

126. *Id.*

127. "Montanans Opposed to Discrimination," Interstate Congress for Equal Rights and Responsibilities (ICERR).

128. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*.

129. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

130. *Id.* at 137, 140, 144.

In an expansive justification of the severance tax, Justice Marshall identified the source of the tribe's power: "The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services. . . ." ¹³¹

Justice Stevens (joined by the Chief Justice and Justice Rehnquist) issued a dissenting opinion diametrically opposed to the majority's interpretation of tribal sovereignty. "Tribal sovereignty is neither derived from nor protected by the Constitution," said the Justice. ¹³² Furthermore, "[i]n sharp contrast to the tribe's broad powers over their own members, tribal powers over non-members have always been narrowly confined," Justice Stevens commented. ¹³³

The Jicarilla Apaches' right to impose a tax on major oil companies was based on the tribe's "general authority, as sovereign, to control economic activity within its jurisdiction," in the words of Justice Marshall. ¹³⁴ The rights to generate income for essential services or to regulate fishing by non-Indians on treaty-held land could not be granted to some Indian tribes even when others had the general authority to tax major oil companies and make a considerable amount of money. ¹³⁵ Unlike *Colville* and *Montana*, the *Jicarilla* decision followed the original concept of tribal sovereignty developed by Chief Justice Marshall.

Jicarilla can be understood in its political context as well. The 2,100 members of the tribe live on a sparsely populated reservation in northwestern New Mexico. ¹³⁶ Few whites live within the reservation boundaries. ¹³⁷ Organized anti-Indian groups have not been conspicuous in New Mexico in recent years.

Conclusion

The decisions examined in this article suggest that the United

131. *Id.* at 137.

132. *Id.* at 168.

133. *Id.* at 171.

134. *Id.* at 137.

135. See *Colville*, 447 U.S. 134 (1980). The Jicarilla would gain an estimated \$2 million annually from imposition of the severance tax in the opinion of Circuit Judge Logan, 617 F.2d at 539-40.

136. *Jicarilla*, 450 U.S. at 134.

137. *Sacramento Bee*, Jan. 26, 1982, at A12.

States Supreme Court has been inconsistent in its application of traditional concepts of tribal sovereignty to jurisdictional disputes between state and tribal governments. The hypothesis, stated *supra*, that judicial policy in Indian law involving jurisdiction reflects the comparative numerical strength of the persons directly affected by the rulings, is supported by the data. In ten of eleven (91%) of the cases examined here the results were consistent with the hypothesis.

The correlation between the results in the Court decisions and political activities in the 1970s is also quite close. Between 1959 and 1973, Native Americans won five straight unanimous decisions on important jurisdictional issues at the United States Supreme Court.¹³⁸ Between 1975 and 1980, however, the situation was completely reversed. Five critical rulings were made and in each instance the Indians lost.¹³⁹ The era of anti-Indian decisions corresponded with the growth of organizations hostile to tribal rights in northwestern and Rocky Mountain states. Considerable antagonism toward Native Americans erupted in the wake of the siege and occupation of Wounded Knee in 1973. The historic victory for Indian rights in the Boldt decision of 1974 then became the catalyst for the development of the national anti-Indian organization, the Interstate Congress for Equal Rights and Responsibilities.¹⁴⁰

It would take a certain amount of temerity to claim that one has "explained" any group of rulings, let alone Indian law decisions that seem rife with inconsistencies. The hypothesis tested here may only prove to be a heuristic device for others attempting to make sense of a series of decisions for which no logical explanation is readily apparent.

138. See *Williams* (1959), *Seymour* (1962), *Warren* (1965), *McClanahan* (1973), and *Mattz* (1973).

139. See *Decoteau* (1975), *Moe* (1976), *Rosebud Sioux* (1977), *Oliphant* (1978), and *Colville* (1980).

140. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).